INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and committee reports involved	2
Statement	2
Summary of argument	5
Argument:	
I. The District Court was without jurisdiction	6
II. The attempted credit was void; hence the 1917 taxes were not overpaid	10
III. The suit may not be sustained as one to recover the 1918 tax	14
IV. There was an account settled which bars recovery	15
Conclusion	16
Appendix	17

CITATIONS

Cases:	
Arnson v. *Murphy*, 109 U. S. 238	6
Bonwit Teller & Co. v. *United States*, 283 U. S. 258	12, 15
Boston Pressed Metal Co. v. *United States*, 282 U. S. 409	9, 13
Cary v. *Curtis*, 3 How. 236	6
Daube v. *United States*, 289 U. S. 367	13
Elliott v. *Swartwout*, 10 Pet. 137	6
First Nat. Bank of Beaver Falls v. *United States*, 8 F. Supp. 484, certiorari denied, 294 U. S. 717	11, 12, 15
Gans S. S. Line v. *Bowers*, 82 F. (2d) 181	13
Gans Steamship Line v. *United States*, 15 A. F. T. R. 826, affirmed, 65 F. (2d) 1016, certiorari denied, 290 U. S. 657	7
Graham & Foster v. *Goodcell*, 282 U. S. 409	13
Leisenring v. *United States*, 4 F. Supp. 993, certiorari denied, 291 U. S. 682	11
Moses v. *United States*, 61 F. (2d) 791, certiorari denied, 289 U. S. 743	7
Parks & Woolson Mach. Co. v. *United States*, 58 F. (2d) 868, certiorari denied, 287 U. S. 634	11
Pottstown Co. v. *United States*, 282 U. S. 479	8
Rosenstadt & Waller v. *United States*, 7 F. Supp. 287	11
Routzahn v. *Reeves Bros. Co.*, 59 F. (2d) 915, certiorari denied, 287 U. S. 650	7
Sage v. *United States*, 250 U. S. 33	9
Smietanka v. *Indiana Steel Co.*, 257 U. S. 1	9

Cases—Continued. Page

Stearns Co. v. *United States*, 291 U. S. 54 ..... 13, 15
United States v. *Bertelsen & Petersen Engineering Co.*, decided March 18, 1938 (C. C. A. 1st) 9, 13
United States v. *Boston Buick Co.*, 282 U. S. 476 9
United States v. *Felt & Tarrant Co.*, 283 U. S. 269 14
United States v. *John Gallagher Co.*, 83 F. (2d) 368 13
United States v. *Piedmont Mfg. Co.*, 89 F. (2d) 296 ..... 9, 13
United States v. *Reeves Bros. Co.*, 83 F. (2d) 121, certiorari denied, 299 U. S. 573 7
United States v. *Savings Bank*, 104 U. S. 728 13
United States v. *Swift & Co.*, 282 U. S. 468 8
U. S. Refractories Corp. v. *Commissioner*, 23 B. T. A. 872 .. 11
Untermyer v. *Bowers*, 7 F. Supp. 347 7

Statutes:

Judicial Code, Sec. 24 (U. S. C., Title 28, Sec. 41) 7, 14
Judicial Code, Sec. 145 (U. S. C., Title 28, Sec. 250) 6
Revenue Act of 1921, c. 136, 42 Stat. 227, Sec. 252 17
Revenue Act of 1928, c. 852, 45 Stat. 791:
Sec. 607 (U. S. C., Title 26, Sec. 1670) 19
Sec. 608 (U. S. C., Title 26, Sec. 1674) 19
Sec. 609 (U. S. C., Title 26, Sec. 1675) 20
Sec. 610 (U. S. C., Title 26, Sec. 1646) 20
Sec. 611 21

Revised Statutes:

Secs. 3226, 3228 14

Miscellaneous:

House Report No. 2, 70th Congress, 1st Sess., pp. 33–34 .. 12, 21
Senate Report No. 960, 70th Congress, 1st Sess., pp. 41–42 .. 12, 23

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 864

LOWE BROTHERS COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 30–33) is reported at 8 F. Supp. 1016. The memorandum opinion of the Circuit Court of Appeals (R. 48–49) is reported at 92 F. (2d) 905.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 11, 1937 (R. 47). Petition for rehearing was denied December 17, 1937 (R. 55). Petition for writ of certiorari was filed March 14, 1938, and was granted April 11, 1938 (R. 56). The jurisdiction of this Court is invoked under

Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a United States District Court under the provisions of Section 24 of the Judicial Code, as amended, has jurisdiction of a suit against the United States for the recovery of internal revenue taxes in an amount in excess of $10,000, where the amount sought to be recovered as 1917 taxes results from a credit to the year 1917 of an overpayment for the year 1918.

2. Where the Commissioner credits an overpayment of taxes for the year 1918 against a barred deficiency for the year 1917, is such credit an overpayment for the year 1917 within the meaning of Sections 607 and 609 of the Revenue Act of 1928, especially where the facts of record show that the overpayment was barred unless timely claim for refund was filed, and there is no showing that such a claim was filed?

STATUTES AND COMMITTEE REPORTS INVOLVED

The statutes and committee reports involved will be found in the Appendix, *infra*, pp. 17–25.

STATEMENT

The case involves the attempted credit of an overpayment of taxes for the year 1918 against a barred deficiency for the year 1917.

The petition was filed in the District Court on May 24, 1930 (R. 1). In open court petitioner

stated that he relied upon the petition as setting out a case for refund of overpayment of tax for the period ended September 30, 1917 (R. 30).

The following facts were stipulated (R. 17–18):

Lowe Brothers Company is a corporation duly organized and existing under the laws of the State of Ohio, having its principal place of business in the City of Dayton, State of Ohio, and was incorporated in June, 1929.

Lowe Brothers Company (incorporated in 1893), predecessor of the petitioner, filed its income and profits tax return for its fiscal year ended September 30, 1917, on October 31, 1917, with the proper Collector of Internal Revenue and paid the tax shown to be due thereon; the predecessor of petitioner filed its income and excess profits tax return for the fiscal year ended September 30, 1918, on October 31, 1918, with the proper Collector of Internal Revenue and paid the tax shown to be due thereon.

On March 15, 1924, the Commissioner of Internal Revenue duly assessed against Lowe Brothers Company (incorporated in 1893) an additional income and profits tax for the fiscal year 1917, amounting to $31,771.71.

On March 15, 1924, the Commissioner of Internal Revenue signed a schedule of overassessments indicating that the petitioner's predecessor had overpaid its income and profits tax for the fiscal year ended September 30, 1918, in the amount of $52,710.03. Of said amount the Collector of Internal

Revenue, under instructions from the Commissioner, credited the sum of $11,230.14 against the deficiency assessment of $31,771.71 for the fiscal year ended September 30, 1917. The Collector of Internal Revenue applied the said credit on April 24, 1924, and the Commissioner approved said credit by signing Schedule IT R 9664 on May 10, 1924. (Exhibit A.)

On April 2, 1928, the petitioner's predecessor filed a claim for refund for $40,000 for its fiscal year ended September 30, 1917 (Exhibit B). On February 1, 1929, the Commissioner of Internal Revenue gave formal notice of rejection of said claim.

On January 25, 1923, and on February 9, 1923, respectively, the petitioner's predecessor filed income and profits tax waivers, approved by the Commissioner of Internal Revenue, for the fiscal year ended September 30, 1917. (Exhibits C and D respectively.)

The answer admitted that the Collector for the First District of Ohio in 1924 was not in office at the time this suit was filed (R. 3, 13).

The claim for refund of 1918 taxes was filed May 15, 1928 (R. 24), more than nine years from date of filing return and payment of tax due thereon (R. 17).

The District Court held that under Section 609 (a) of the Revenue Act of 1928, the alleged credit to the barred deficiency for 1917 was a nullity and therefore did not constitute an overpayment for

1917. Petitioner had indicated in open court that it relied upon the petition as setting out a case for refund of tax for 1917 (R. 30); hence, respondent's motion for judgment was sustained.

The Circuit Court of Appeals, following its earlier decisions, reversed the District Court on this issue, but held that the court was without jurisdiction of the suit against the United States on a claim in excess of $10,000.

SUMMARY OF ARGUMENT

The amount involved was in excess of $10,000. The District Court was without jurisdiction. The United States District Courts have jurisdiction of suits against the United States for amounts in excess of $10,000 only where suit would lie against a Collector who is dead or out of office. Here the amount sued for was not collected by the Collector for the year 1917, but by an alleged credit by the Commissioner. Suit would not lie against the Collector; hence, it does not come within the exceptions provided by Section 24 (20) of the Judicial Code (U. S. C., Title 28, Sec. 41).

Under Section 609 of the Revenue Act of 1928 the credit was void. The object of subsection 609 (a) was to protect the taxpayer, and the purpose of subsection 609 (b) to protect the Government from credits made after the bar of the statute of limitations. Here, the facts of record show not only that the 1917 deficiency was barred, but the same facts disclose that the 1918 overpayment was

barred unless timely claim for refund was filed. The failure to show the filing of such a claim is fatal to recovery.

The suit may not be sustained as one to recover the 1918 tax for any one of several reasons. In open court petitioner indicated that its suit was for recovery of an overpayment for 1917 tax. Petitioner admits the suit is not upon an account stated. The claim for refund of 1918 taxes was filed after the running of the statute.

ARGUMENT

I

THE DISTRICT COURT WAS WITHOUT JURISDICTION

The District Court had no jurisdiction of this suit against the United States to recover $11,230.14 (in excess of $10,000), allegedly credited against 1917 taxes because of an overpayment for 1918.

The District Courts have jurisdiction of suits against collectors regardless of the amount involved. *Elliott* v. *Swartwout,* 10 Pet. 137; *Arnson* v. *Murphy,* 109 U. S. 238; *Cary* v. *Curtis,* 3 How. 236. The Court of Claims has jurisdiction of suits against the United States without regard to the amount involved. Sec. 145 of the Judicial Code (U. S. C., Title 28, Sec. 250).

The Congress under the Tucker Act originally conferred upon the District Courts jurisdiction of suits against the United States of all claims not exceeding ten thousand dollars. Subsequent

amendments (c. 136, 42 Stat. 311 and c. 309, 43 Stat. 972), did not disturb the jurisdiction of the District Courts concurrent with the Court of Claims "of all claims not exceeding ten thousand dollars," but their jurisdiction was extended to include suits against the United States for the recovery of any internal revenue tax "even if the claim exceeds $10,000, if the *collector of internal revenue by whom such tax, penalty, or sum was collected* is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced." [Italics supplied.] Sec. 24 (20) of the Judicial Code, *infra*, p. 17.

It is thus seen that the jurisdiction conferred upon the District Courts to hear and determine suits against the United States for the recovery of taxes in excess of $10,000 is as plainly limited under the statute by the requirement that the tax be collected by a collector of internal revenue, as it is by the requirement that the collector be dead or out of office. *Moses* v. *United States*, 61 F. (2d) 791 (C. C. A. 2d), certiorari denied, 289 U. S. 743; *United States* v. *Reeves Bros. Co.*, 83 F. (2d) 121 (C. C. A. 6th), certiorari denied, 299 U. S. 573; *Routzahn* v. *Reeves Bros. Co.*, 59 F. (2d) 915 (C. C. A. 6th), certiorari denied, 287 U. S. 650; *Gans Steamship Line* v. *United States*, 15 A. F. T. R. 826 (S. D. N. Y.), affirmed, 65 F. (2d) 1016 (C. C. A. 2d), certiorari denied, 290 U. S. 657; *Untermyer* v. *Bowers*, 7 F. Supp. 347 (S. D. N. Y.).

62471—38——2

The tax here was not collected by the Collector. If it became a part of the tax paid for 1917, it was because of the application thereto of monies already in the hands of the Treasury officials. It was the Commissioner's approval of the schedule on May 10, 1924, if anything, which collected the tax for 1917. In *United States* v. *Swift & Co.*, 282 U. S. 468, there had been a credit of an overpayment for year A against an unbarred deficiency for the year B. The question involved was the date which started the running of the statute of limitations against claim for refund for the year B. This Court said (pp. 473–474, 475–476):

> One of three dates may possibly be considered the date of the allowance of the credit—that on which the Commissioner forwarded the schedule of overassessments to the Collector, that on which the Collector finished his calculations and entered the amount of the credit in the taxpayer's account, or that on which the Commissioner approved the schedule of credits and refunds. * * *
>
> * * * * * *
>
> As the sole discretion and authority to allow a credit rests with the Commissioner, we think that, in the light of the procedure above outlined, his approval of the schedule of credits and refunds must be taken to be the final exercise of that discretion and the allowance of the credit. * * *

Thus the action of the Commissioner collected the tax. Cf. *Pottstown Co.* v. *United States*, 282

U. S. 479; *United States* v. *Boston Buick Co.*, 282 U. S. 476. Hence, this is not a suit which could be maintained against the Collector while in office. *Smietanka* v. *Indiana Steel Co.*, 257 U. S. 1; *Sage* v. *United States*, 250 U. S. 33.

As the statute specifically provides that the tax for the recovery of which the suit is brought must be collected by the Collector, the District Court had no jurisdiction to hear or determine this suit.

United States v. *Piedmont Mfg. Co.*, 89 F. (2d) 296 (C. C. A. 4th), holding to the contrary, we believe erroneously augments the jurisdiction of the District Courts. In reaching its decision the court relied largely upon its statement (p. 298): "No such distinction" as between collection and credit "was made in *Graham* v. *Goodcell*, 282 U. S. 409 * * *." But it must be remembered that this Court there decided several cases. The only case involving a credit of an overpayment for one year to a deficiency for another (*Boston Pressed Metal Co.* v. *United States*) was a suit originating in the Court of Claims and which involved less than $10,000. *United States* v. *Bertelsen & Petersen Engineering Co.*, decided March 18, 1938 (C. C. A. 1st), not yet officially reported, but found in 1938 C. C. H., Vol. 4, ¶9201, held that the suit there was to recover the overpayment of taxes for the year A (in which the collector collected the tax), not the year of the deficiency. Furthermore, rehearing upon the jurisdictional question only was granted April 14, 1938.

II

THE ATTEMPTED CREDIT WAS VOID; HENCE THE 1917 TAXES WERE NOT OVERPAID

Section 609 of the Revenue Act of 1928, c. 852, 45 Stat. 791 (U. S. C., Title 26, Sec. 1675), provides:

> (*a*) *Credit against barred deficiency.*—Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under section 607.
>
> (*b*) *Credit of barred overpayment.*—A credit of an overpayment in respect of any tax shall be void if a refund of such overpayment would be considered erroneous under section 608.
>
> (*c*) *Application of section.*—The provisions of this section shall apply to any credit made before or after the enactment of this Act.

The facts of record disclose not only that the deficiency was barred, but that the credit or refund of the overpayment was barred.

Under Section 252 of the Revenue Act of 1921, *infra,* pp. 17–19, the overpayment for 1918 was barred unless claim for refund was filed within five years after the return was due; or unless the excess tax resulted from a decrease in invested capital due to the fact that taxpayer failed to take adequate deductions in previous years.

The 1918 return was filed October 31, 1918 (R. 17). The Commissioner approved the credit May 10, 1924 (R. 17–18). Hence, as petitioner admits (Br. 25), the overpayment was barred in the absence of a timely claim for refund. The filing of such a claim cannot be presumed. Petitioner may not attack the approval of May 10, 1924, and at the same time rely upon its presumptive correctness. Petitioner has not shown, and, we submit, cannot show that the determination of an overpayment for 1918 resulted from a claim for refund, and not from a claim in abatement. In such circumstances the credit was void under Section 609 (b).

As to whether the credit was void under Section 609 (a) the lower courts are in conflict. The Court of Claims holds that the word "void" used in the statute means void, and that where the collection of a deficiency would be an overpayment under Section 607, *infra,* the attempted credit is a nullity—hence taxes paid for year A are not by such a credit carried into year B. *Parks & Woolson Mach. Co.* v. *United States,* 58 F. (2d) 868, certiorari denied, 287 U. S. 634; *First Nat. Bank of Beaver Falls* v. *United States,* 8 F. Supp. 484, certiorari denied, 294 U. S. 717; *Leisenring* v. *United States,* 4 F. Supp. 993, certiorari denied, 291 U. S. 682; *Rosenstadt & Waller* v. *United States,* 7 F. Supp. 287. See also *U. S. Refractories Corp.* v. *Commissioner,* 23 B. T. A. 872.

Section 609 was enacted to do away with the uncertainty of the proper treatment of credits of barred overpayments and credits to barred deficiencies. The use of the word "void" seems deliberate. See H. Rep. No. 2, 70th Cong., 1st Sess., pp. 33, 34; and S. Rep. No. 960, 70th Cong., 1st Sess., pp. 41, 42, *infra,* pp. 21–25. Any other construction of Section 609 leaves it meaningless. Its related sections, 607, 609, 610 and 611, deal with collections and refunds. Section 607 and 611 use "overpayment" in referring to barred collections. Sections 608 and 610 use "erroneous" in referring to refunds. It would appear that Congress did not use like words in (a) and (b) of Section 609, because it intended such attempted credits to be a nullity. In fact, subdivision (a) of Section 609 provides the credit will be "void" if payment would be considered an "overpayment" under Section 607.

The Court of Claims holds that where a claim for refund is filed for the year of the overpayment, an attempted credit to a barred deficiency is a disallowance of that claim. *First Nat. Bank of Beaver Falls* v. *United States, supra.* This can probably be reconciled with the decision of this Court in *Bonwit Teller & Co.* v. *United States,* 283 U. S. 258, wherein it was held that the claim was disallowed, because in the latter case the certificate of overassessment was delivered to the taxpayer, upon which there arose an account stated forming the basis for the cause of action upon which the suit

was brought. See *United States* v. *Savings Bank,* 104 U. S. 728. Cf., *Daube* v. *United States,* 289 U. S. 367.

The Circuit Courts of Appeals for the Sixth Circuit and the Second Circuit hold that a credit against a barred deficiency is a collection of the deficiency by the Commissioner. *United States* v. *John Gallagher Co.,* 83 F. (2d) 368 (C. C. A. 6th); *Gans S. S. Line* v. *Bowers,* 82 F. (2d) 181, 183 (C. C. A. 2d).

United States v. *Piedmont Mfg. Co.,* 89 F. (2d) 296 (C. C. A. 4th), and *United States* v. *Bertelsen & Petersen Engineering Co., supra,* did not involve credits to *barred* deficiencies. Furthermore, in the latter case the court said (p. 9697):

> * * * we think in the last analysis it is based on a claim for a balance of the overpayment for the 1917 tax and not for an illegal collection of a 1918 tax [the year of the deficiency]. The District Court so held. * * *

The decisions holding that a credit to a barred deficiency is a collection by the Commissioner of the barred deficiency rely upon the decisions of this Court in *Graham & Foster* v. *Goodcell* and *Boston Pressed Metal Co.* v. *United States,* 282 U. S. 409, 424; and *Stearns Co.* v. *United States,* 291 U. S. 54. However, in both of these cases this Court held on the facts that the credit would not have been an overpayment under Section 607; hence, Section 609 did not apply.

III

THE SUIT MAY NOT BE SUSTAINED AS ONE TO RECOVER THE 1918 TAX

The District Court stated (R. 30):

> Some question having been raised as to the nature of plaintiff's action, it was indicated in open court at the time of trial that plaintiff relied upon the petition as setting out a case for refund of overpayment of tax for the period ended September 30, 1917. * * *

Certainly at this date petitioner may not be allowed to change his front.

Furthermore, a claim for refund is a condition precedent to suit. *United States* v. *Felt & Tarrant Co.*, 283 U. S. 269. The only claim for refund for 1918 was filed May 15, 1928 (R. 24). The claim was not timely. Revised Statutes, Secs. 3226, 3228, as amended by Sections 1112 and 1113 of the Revenue Act of 1926. Return was filed on October 31, 1918, and the tax shown due thereon was then paid. (R. 17.)

In addition, there is no showing of the date the certificate of overassessment was delivered to petitioner. The record does show that the balance shown thereon was paid May 2, 1924. (R. 25.) The Commissioner approved the schedule May 10, 1924. Suit was instituted May 24, 1930, more than six years after signing of the schedule. Hence, there is no showing that the suit was timely, even if based upon a delivery of the certificate sufficient to

constitute an account stated such that the six year limitation would apply. See *Bonwit Teller & Co.* v. *United States, supra.* Nor in such case would the District Court have jurisdiction on such a theory, as the amount is in excess of $10,000.

On no theory may petitioner sustain the suit as one for 1918 taxes.

IV

THERE WAS AN ACCOUNT SETTLED WHICH BARS RECOVERY

Exhibit A to the stipulation (R. 20) shows credits on May 10, 1924, to the years 1916, 1921, and 1922, as well as to the year 1917, and an abatement of taxes for 1918. The balance of the deficiency was paid May 2, 1924. (R. 25.) Petitioner accepted these credits, paid the balance due and made no objection thereto until nearly four years thereafter—April 2, 1928. The situation is no different from that in *Stearns Co.* v. *United States,* 291 U. S. 54. This Court's statement paraphrases the facts in the instant case (p. 66):

> The taxpayer did not object to the account as submitted in its final form. Far from objecting, it paid the resulting balance, and by this act as well as silence conceded the indebtedness. Indeed, there was more than an account stated; by force of voluntary payment there was also an account settled.

See also *First Nat. Bank of Beaver Falls* v. *United States, supra.*

CONCLUSION

The District Court was without jurisdiction. Recovery is barred as there was an account settled. The attempted credit was void. Upon the facts no recovery may be had for 1918 taxes. The decision should be affirmed.

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.
JAMES W. MORRIS,
Assistant Attorney General.
SEWALL KEY,
A. F. PRESCOTT,
Special Assistants to the Attorney General.

APRIL 1938.

APPENDIX

Judicial Code, as amended:

SEC. 24. The district courts shall have original jurisdiction as follows:

* * * * *

Twentieth. Concurrent with the Court of Claims, of all claims not exceeding ten thousand dollars founded upon the Constitution of the United States or any law of Congress, * * * and of any suit or proceeding commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced. * * * All suits brought and tried under the provisions of this paragraph shall be tried by the court without a jury. (U. S. C., Title 28, Sec. 41.)

Revenue Act of 1921, c. 136, 42 Stat. 227:

SEC. 252. That if, upon examination of any return of income made pursuant to this Act, the Act of August 5, 1909, entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," the Act of October 3, 1913, entitled "An Act to reduce

tariff duties and to provide revenue for the Government, and for other purposes," the Revenue Act of 1916, as amended, the Revenue Act of 1917, or the Revenue Act of 1918, it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: *Provided,* That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer: *Provided further,* That if upon examination of any return of income made pursuant to the Revenue Act of 1917, the Revenue Act of 1918, or this Act, the invested capital of a taxpayer is decreased by the Commissioner, and such decrease is due to the fact that the taxpayer failed to take adequate deductions in previous years, with the result that an amount of income tax in excess of that properly due was paid in any previous year or years, then, notwithstanding any other provision of law and regardless of the expiration of such five-year period, the amount of such excess shall, without the filing of any claim therefor, be credited or refunded as provided in this section: *And provided further,* That nothing in this section shall be construed to bar from allowance claims for refund filed prior to the passage of the Revenue Act of 1918 under subdivision (a) of section 14 of the Revenue Act of 1916, or filed prior to the

passage of this Act under section 252 of the Revenue Act of 1918.

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES.

Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim. (U. S. C., Title 26, Sec. 1670.)

SEC. 608. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST TAXPAYER.

A refund of any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) made after the enactment of this Act, shall be considered erroneous—

(a) if made after the expiration of the period of limitation for filing claim therefor, unless within such period claim was filed; or

(b) in the case of a claim filed within the proper time and disallowed by the Commissioner after the enactment of this Act, if the refund was made after the expiration of the period of limitation for filing suit, unless—

(1) within such period suit was begun by the taxpayer, or

(2) within such period, the taxpayer and the Commissioner agreed in writing to suspend the running of the statute of limitations for filing suit from the date of the agreement to the date of final decision in one or more named cases then pending before the United States Board of Tax Appeals or the courts. (U. S. C., Title 26, Sec. 1674.)

SEC. 609. ERRONEOUS CREDITS.

(a) *Credit against barred deficiency.*—Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under section 607. (U. S. C., Title 26, Sec. 1675.)

(b) *Credit of barred overpayment.*—A credit of an overpayment in respect of any tax shall be void if a refund of such overpayment would be considered erroneous under section 608. (U. S. C., Title 26, Sec. 1675.)

(c) *Application of section.*—The provisions of this section shall apply to any credit made before or after the enactment of this Act. (U. S. C., Title 26, Sec. 1675.)

SEC. 610. RECOVERY OF AMOUNT ERRONEOUSLY REFUNDED.

(a) Any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) refund of which is erroneously made, within the meaning of section 608, after the enactment of this Act, may be recovered by suit brought in the name of the United States, but only if such suit is begun within two years after the making of such refund.

(b) Any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) which has been erroneously refunded (if such refund would not be considered as erroneous under section 608) may be recovered by suit brought in the name of the United States, but only if such suit is begun before the expiration of two years after the making of such refund or before May 1, 1928, whichever date is later. (U. S. C., Title 26, Sec. 1646.)

SEC. 611. COLLECTIONS STAYED BY CLAIM IN ABATEMENT.

If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection.

H. Rep. No. 2, 70th Cong., 1st Sess., pp. 33–34:

SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES.

Section 1106 (a) of the 1926 Act failed to resolve many doubtful questions as to the legal effect which follows the expiration of the period of limitations prescribed for the assessment or collection of a tax or for the making of a refund or credit or the bringing of a suit for refund. Section 1106 (a) of the 1926 Act is repealed as of its effective date and is replaced by sections 607, 608, 609, and 610 of this bill.

Section 607 of the bill prescribes the effect to be given to the expiration of a period of limitations against the United States and section 608 relates to the effect of the expiration of limitations periods against the taxpayer.

Section 607 provides that regardless of the correct tax liability any payment shall be an overpayment if made after the period of limitation on assessment (no assessment hav-

ing been made within such period) or after the expiration of the period of limitation on collection by distraint or court proceedings (no distraint or court proceedings having been begun within such period). An overpayment under section 607 is to be credited or refunded the same as any other overpayment.

Section 607 is applicable to payments made before or after the enactment of this Act. Any such overpayment shall be credited or refunded, however, only if claim therefore is filed within the proper period of limitation.

Neither section 607 nor section 608 applies to payments pursuant to a final decision of the Board of Tax Appeals or of a court, whether or not the question as to the statute of limitations was raised in the proceeding. The decision is final and under no circumstances could a payment pursuant to it be considered erroneous. Obviously, also, neither section applies to cases which have been closed by a final agreement under section 1106 (b) of the 1926 Act or section 606 of the new Bill.

SEC. 608. EFFECT OF EXPIRATION OF PERIOD OF LIMITATIONS AGAINST THE TAXPAYER.

If a refund is made after the expiration of the period for filing claim (claim not having been filed within the period) or after the rejection, after the date of the enactment of this Act, of a claim filed within the proper period and if the period for filing suit has expired (no suit having been filed within the period), the refund thus made shall be considered as erroneous and is recoverable by the United States as provided in section 610.

SEC. 609. ERRONEOUS CREDITS.

Section 609 provides that a credit of an overpayment against a barred deficiency or

a credit of a barred overpayment against a deficiency which is not barred, shall be void if payment of the deficiency in the first case or the making of a refund in the second would constitute an overpayment or an erroneous refund under section 607 or 608. In other words, the credit is void if either the deficiency or the overpayment is barred.

Section 609 applies to any credit made before or after the enactment of this Act.

S. Rep. No. 960, 70th Cong., 1st Sess., pp. 41–42:

SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES.

Section 1106 (a) of the 1926 act failed to resolve many doubtful questions as to the legal effect which follows the expiration of the period of limitation prescribed for the assessment or collection of a tax or for the making of a refund or credit or the bringing of a suit for refund. Section 1106 (a) of the 1926 act is repealed as of its effective date and is replaced by sections 607, 608, 609, and 610 of this bill.

Section 607 of the bill prescribes the effect to be given to the expiration of a period of limitation against the United States and section 608 relates to the effect of the expiration of a period of limitation against the taxpayer.

Section 607 provides that regardless of the correct tax liability any payment shall be an overpayment if made pursuant to an assessment after the expiration of the period of limitation on assessment (no assessment having been made within such period) or after the expiration of the period of limitation on collection by distraint or court proceedings (no distraint or court proceeding having been begun within such period). It

is immaterial whether the payment was voluntary or involuntary, and duress is also of no significance in determining the right to recover an amount paid after the statute has run. An overpayment under section 607 is to be credited or refunded the same as any other overpayment.

Section 607 is applicable to payments made before or after the enactment of this act. Any such overpayment shall be credited or refunded, however, only if claim therefor is filed within the proper period of limitation.

The section has been rewritten by a committee amendment in somewhat simpler language.

Neither section 607 nor section 608 applies to payments pursuant to a final decision of the Board of Tax Appeals or of a court, whether or not the question as to the statute of limitations was raised in the proceeding. The decision is final and under no circumstances could a payment pursuant to it be considered erroneous. Obviously, also, neither section applies to cases which have been closed by a final agreement under section 1106 (b) of the 1926 act or section 606 of the new bill.

SEC. 608. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST THE TAXPAYER.

If a refund is made after the expiration of the period for filing claim (claim not having been filed within the period) or after the rejection, after the date of the enactment of this act, of a claim filed within the proper period, and if the period for filing suit has expired (no suit having been filed within the period), the refund thus made shall be considered as erroneous and is recoverable by the United States as provided in section 610.

It seems desirable to provide some means

whereby, in connection with questions of broad application to a great number of cases, one test suit may be brought and all the other cases involving the same point may be held in abeyance until the test suit is decided. Accordingly, the committee proposes to amend the House bill by inserting in section 608 a provision to the effect that in cases of the kind described the commissioner and the taxpayer may execute an agreement suspending the running of the statute of limitations for filing suit until final decision in the test case or cases named in the agreement. This amendment will prevent a multiplicity of suits without disturbing in any way the desirable policy embodied in the provisions of the House bill. It will be noted that the agreement is not that the parties thereto shall be bound by the test case in the settlement of the tax liability.

SEC. 609. ERRONEOUS CREDITS.

Section 609 provides that a credit of an overpayment against a barred deficiency or a credit of a barred overpayment against a deficiency which is not barred shall be void if payment of the deficiency in the first case or the making of a refund in the second would constitute an overpayment or an erroneous refund under section 607 or 608.

Section 609 applies to any credit made before or after the enactment of this act.

U. S. GOVERNMENT PRINTING OFFICE: 1938

p. 2

SUPREME COURT OF THE UNITED STATES.

No. 864.—October Term, 1937.

Lowe Brothers Company, Petitioner, vs. United States. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[May 16, 1938.]

Mr. Justice Stone delivered the opinion of the Court.

The question for decision is whether the district courts of the United States have jurisdiction, under § 24(20) of the Judicial Code, of a suit brought against the United States to recover income and excess profits taxes in an amount in excess of $10,000 when the recovery sought is of an overpayment of taxes for one year, effected by crediting against a barred deficiency for that year an overpayment for another year.

Petitioner[1] overpaid income and excess profits taxes for 1918. The commissioner, on May 15, 1924, signed a schedule of overpayments by which he approved a credit as of April 24, 1924 of a part of the 1918 overpayment, in an amount exceeding $10,000, against a tax deficiency of petitioner for 1917, the collection of which was then barred by the statute of limitations. The collector in office in 1924, when the credit was allowed, having retired, petitioner brought the present suit against the United States, in the district court for southern Ohio, to recover the amount of the credit. The petition alleges overpayment of the 1917 tax by reason of the credit, and demands its recovery. Petitioner has neither alleged nor proved any claim for refund of the 1918 overpayment, recovery of which, without such claim, was barred by limitation.

The trial court, construing the suit as one to recover an overpayment of 1917 taxes, as petitioner conceded in open court, gave judgment dismissing the petition on the ground that the credit of the 1918 overpayment upon the barred deficiency for 1917 was not

[1] As petitioner stands in the place of its corporate predecessor by virtue of a merger, and as their rights and interests in the present suit may be treated as identical, both will be referred to as "petitioner".

a payment of the 1917 tax since the credit is "void" under the applicable sections, 607 and 609, of the Revenue Act of 1928. The Court of Appeals for the Sixth Circuit affirmed on a different ground, holding that the district court was without jurisdiction, under the provisions of § 24(20) of the Judicial Code, 28 U. S. C. § 41(20), which confers jurisdiction on the district court of suits against the United States to recover taxes erroneously assessed or collected in excess of $10,000, only if the collector by whom the tax was collected is dead or is not in office when the suit is brought. 92 F. (2d) 905. We granted certiorari, — U. S. —, upon a petition presenting the single question of the jurisdiction of the district court, in order to resolve an asserted conflict between the decision below and that of the Court of Appeals for the Fourth Circuit in *United States* v. *Piedmont Mfg. Co.*, 89 F. (2d) 296.

The Court of Appeals, following *United States* v. *Piedmont Manufacturing Co., supra,* and its own decision in *United States* v. *John Gallagher Co.*, 83 F. (2d) 368, thought that the credit of the 1918 overpayment of the 1917 tax was not void, but voidable only at the election of the taxpayer and was consequently an overpayment of 1917 taxes for which recovery might be had in a court having jurisdiction. But following its own decision in *United States* v. *Reeves Bros. Co.*, 83 F. (2d) 121, and that of the Court of Appeals for the Second Circuit in *Moses* v. *United States,* 61 F. (2d) 791, it held that the district court was without jurisdiction because the collection of the 1917 tax, effected by the allowance of the credit, was not made by a collector and thus did not satisfy the jurisdictional requirement.

The Court of Claims has jurisdiction of suits against the United States brought to recover internal revenue taxes erroneously collected without regard to the amount involved. § 145 J. C., 28 U. S. C. § 250. Before the amendment of 1921, c. 136, 42 Stat. 311 (continued by Revenue Act of 1924, 44 Stat. 121), § 24(20) of the Judicial Code gave jurisdiction to the district courts, concurrent with the Court of Claims, of suits against the United States to recover "claims not exceeding ten thousand dollars founded upon . . . any law of Congress . . . or upon any contract, express or implied, with the Government of the United States . . ." C. 231, 36 Stat. 1093. Both before and after the amendment, district courts also had jurisdiction of suits against a collector of internal revenue brought to recover, in any amount, internal rev-

(, and , so far as now material, in the Revenue Act of 1926, 44 Stat. 121

enue taxes which he had erroneously collected. § 24(5) J. C., 28 U. S. C. § 41(5). Such suits brought against the collector survive his retirement from office and do not abate upon his death. *Patton* v. *Bradley,* 184 U. S. 608; *Smietanka* v. *Indiana Steel Co.,* 257 U. S. 1; *Union Trust Co.* v. *Wardell,* 258 U. S. 537.

By the amendment of § 24(20) the jurisdiction of district courts was extended so as to embrace suits against the United States to recover taxes "even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax . . . was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced". Since the suit allowed against the collector before the amendment was based on his personal liability, *Sage* v. *United States,* 250 U. S. 33; *Smietanka* v. *Indiana Steel Co., supra,* no such suit will lie unless he has collected the tax. The obvious purpose of the amendment was to permit a substitution of a suit against the United States for the suit previously allowed against the collector whenever the amount claimed exceeds $10,000 and the collector is out of office. This is made evident by the words of the amendment which authorize the substitution only when the collection is made by the collector when in office.

As we think it plain that no suit could have been maintained against the collector to recover the alleged overpayment, it follows that the district court was without jurisdiction to entertain the present suit. If the 1917 tax can be said to have been collected at all, as to which we express no opinion, it was collected by the action of the commissioner in crediting against the 1917 deficiency the 1918 overpayment. In 1924, the year of the claimed overpayment, the collector received no overpayment of petitioner's tax for any year. If the 1917 taxes were then collected it was by virtue of the application to the 1917 deficiency of moneys already in the treasury. The collector was without authority to make such application. It was the commissioner's approval of the schedule of overpayments which was effective for that purpose. *Girard Trust Co.* v. *United States,* 270 U. S. 163, 170, 171; *United States* v. *Swift & Co.,* 282 U. S. 468. The certification of the overpayment by the collector to the commissioner, a mere ministerial act, could subject the collector to no personal liability.

It is true that under the statutes of the United States the collector is relieved from personal liability except in the case where

the district court is of opinion that he acted without probable cause, *Sage* v. *United States, supra,* 37, and that such suits against the collector are commonly but a means of collecting the overpayment from the United States. *Moore Ice Cream Co.* v. *Rose,* 289 U. S. 373, 382. But no statute has enlarged the collector's common law liability to suit, and we cannot ignore the words of the amendment of § 24(20) which, in providing for a suit against the United States in lieu of one against the collector, make collection by him the *sine qua non* of jurisdiction.

Graham & Foster v. *Goodcell,* 282 U. S. 409, did not deal with the point here considered. The only one of the several cases decided there involving a credit of an overpayment for one year against a deficiency for another, *Boston Pressed Metal Co.* v. *United States,* was a suit brought in the Court of Claims for less than $10,000.

Affirmed.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.